

Working Time Rules for the Road Transport Sector: New Regulations and Guidance for Industry.

Outcome of consultation and the Government's Response

This document:

(a) summarises the responses received when it consulted on views on the draft Road Transport (Working Time) Regulations ("the RTR") that will implement a European Directive (2002/15/EC) "on the organisation of the working time of persons performing mobile road transport activities", into UK law. We also sought views on draft guidance for industry and other stakeholders, and,

(b) sets out the Government's response to points raised in consultation.

Part 1: Background and summary of responses

Last year, the Government launched a consultation exercise on its approach to implementing Directive 2002/15/EC "on the organisation of the working time of persons performing mobile road transport activities". In the light of that consultation exercise the Government announced its decisions on the key issues earlier this year - see

http://www.dft.gov.uk/pns/DisplayPN.cgi?pn_id=2004_0052

The Government committed to consulting on the draft implementing Regulations and formal guidance. This consultation was launched on 1 November 2004 and ran for 6 weeks.

We received just over 50 responses. Most of the responses were from trade associations, trade unions and employers: -

Type of respondent	Number of responses
Individual drivers	3
bus/coach operator	3
Hire/reward goods operator	9
Legal	1
Lobby/other/Agency	8
Own account operator	3
Trade Association	15
Union / union rep	10
Total:	52

Main questions asked in consultation and summary of responses

- i. **Is there enough information about periods of availability ('PoA')?** - Most employers found the examples of Periods of Availability in the guidance helpful and were content with the Government's approach. Most trade unions thought our interpretation was too liberal, open to abuse and not consistent with the intention of the Directive. They argued that PoA should either count as working time, or that its use should be restricted.
- ii. **Is there enough information about who can be defined as self-employed drivers** - Both employers and trade unions were reasonably content with the definition of self-employed driver. Some trade unions wanted all self-employed drivers to be covered by the Regulations before the required date of 2009 (to prevent drivers being forced into a change in their employment status).
- iii. **Are you happy with our new method of calculating the average 48 hour week (and should the existing method under the Working Time Regulations be given as an option)?** - The comments on our new approach to calculating average working time were generally favourable. Apart from the Freight Transport Association (FTA), all those who expressed an opinion also wanted the option of using the method of calculation currently used in other sectors of employment (as laid down under the Working Time Regulation 1998).
- iv. **Should occasional mobile workers (as defined) be excluded from the regulations** - Employers welcomed the proposals to exempt those who drive only occasionally from the RTR (they would still be covered by the main working time rules) with most asking if the definition could be widened. Most trade unions thought it introduced a loophole that employers would exploit and would encourage the use of agency drivers.
- v. **Views sought on excluding non-road transport activities from the definition of working time** - Employers wanted more advice on which activities would not count towards working time. Some asked why time spent working in the employer's warehouse counted as working time, whereas time spent working for a second employer outside the road transport sector (e.g. in a bar) did not count towards the limits under the new regulations. Trade unions (and some employers) thought this would encourage workers to have a second job.

Other issues raised in responses

- vi. **Non-Statutory Annual Leave** - Most employers welcomed the proposed advice that additional contractual (non-statutory) annual leave could be used to reduce average working time. Trade unions argued that all annual leave should be neutral when calculating working time.
- vii. **Training** - The FTA and the Road Haulage Association (RHA) argued that training that was not connected with commercial activity of the company should not count as working time.
- viii. **Emergencies** - The FTA argued that the advice on dealing with emergencies in the guidance should be broadened and be incorporated in the regulations.

- ix. **Periods of availability (crew):** The British Association of Removers (BAR) argued that time spent travelling to a location by porters should count as a period of availability rather than working time.
- x. **Rest (for crew):** The FTA was concerned that the regulations applied EU drivers hours rest limits to crew and other travelling staff. They argued they should be covered by "adequate rest" requirements under existing Working time Regulations 1998 (as amended).
- xi. **Workforce Agreements** - RHA would like the procedure behind workforce agreements to be simplified and applied to individuals rather than groups of workers.
- xii. **Agencies** - More information about how workforce agreements applied to agency drivers was sought.

Part 2: Issues raised - detail

(i) Whether our documents provide enough information about the definition of periods of availability ('PoA')

Main points from consultation

- Most unions considered our interpretation of Periods of Availability is too relaxed and open to abuse. They took particular issue with one of our examples of PoA, where a driver must remain in the cab for security of the load or for his own security. The Unions argued that, for time to count as a PoA, the driver must be free to leave the cab or workstation.
- Most employers thought our examples of PoA were useful, but more examples are always welcome.

In detail:

Employers asked for more examples of what could constitute PoA, particularly for those drivers carrying dangerous goods. DHL wanted some of the phrases in the guidance clarified - e.g. what the driver "typically experiences". The fact that drivers do not need to be told about PoAs in advance (it was enough that the driver knows or is expecting a delay) will lead to confusion according to ASDA. They said it would be welcomed by drivers, but presented potential auditing problems compared with a system that formally notifies drivers of delays. Tesco's asked whether using their in-cab monitoring system to predict the foreseeable duration of a period of availability would be acceptable under the RTR.

The T&GWU identified areas of potential conflict between an employer and worker over PoAs. For example, who is the final arbitrator if an employer wants waiting time to count as a PoA, but the driver wants it recorded as

working time? They propose that a) periods may count as PoAs only where an employer tells a worker about such periods before the start of their driving duties, b) if a driver is required to stay at the workstation for safety and security reasons, this should count as working time and c) drivers must be told about a delay for it to count as a PoA.

The Government's response

The Government has decided to make no significant changes to the guidance regarding PoA at this stage - but it will keep the situation under close review.

The Government believes there is no need to amend the definition of periods of availability (PoA) in the regulations as the text has been copied from the European directive itself. Where concerns have been raised these relate to the guidance. The Government set out its proposed approach to recording PoAs after the first consultation exercise, and believes the guidance reflects this. However the Government will keep the practical application of the Regulations under close review, with particular interest in the interpretation of PoAs.

(ii). Whether our documents provide enough information about what constitutes a "self-employed driver"

Main points from consultation

- Further clarification needed in the guidance about the definition of a self-employed driver.

In Detail:

The British Association of Removers and Road Haulage Association sought further clarification on the definition of a self-employed driver - notably whether self-employed drivers required an O' licence to meet the definition. Clarification was also sought in terms of owner-drivers who set themselves up as Limited companies. The Federation of small businesses was concerned that a tight definition would discourage the creation of new companies.

Ian Bevan, a self-employed driver, argued that the definition of self-employed driver should be relaxed (at least for those contracted as self-employed before 23 March 2005). It would he argued, lead to difficulties if a driver could not amend an existing contract and was (for example) committed to purchasing a new vehicle, if their income was reduced after March 2005.

The Government's Response

The Government has already announced that it will apply working time legislation to self-employed drivers from March 2009 (as required under the directive). Until then, self-employed drivers will be excluded from working time legislation.

However the definition of a self-employed driver under the European Directive, which we have copied into our regulations, is very tight. This definition was agreed between the Council and the European Parliament, to discourage employers from forcing their drivers to switch employment status and thus avoiding the Directive's requirements. The Government also wanted to avoid fragmentation within the industry, so it is important that the division between worker and self-employed drivers is clearly defined. The directive states that drivers must work "under the cover of a Community licence".

The Government believes there is no need to amend the Regulations but will amend the guidance to make clear that, to qualify as a self-employed driver, the individual must hold an Operator's licence. The guidance will also clarify the position of drivers who operate under limited liability.

(iii) Whether the proposed new method of calculating average working time was acceptable. In addition, whether the method of calculating average working time used by other sectors of employment under the 1998 Regulations should be allowed as an alternative.

Main points from consultation:

- Most favoured the new method, although not everyone agreed with inputting a notional 48 hour week and 8 hour day to offset leave.
- Most responses (that expressed a view) would like the option of using the existing method under the Working Time Regulations 1998 ('WTR') to calculate working time.

In Detail:

Not many replies addressed the issue of whether the alternative method of calculation of working time could be used on an optional basis, but most of those that did supported the idea. Asda for example were keen, as they wanted to use the same method of calculating working time that they used for their non-mobile staff. Bus companies were keen to retain the option of using the WTR method too. The Original London Sightseeing Tour Ltd asked for it to be retained, even though the RTR methods were superior. First Group suggested our off-the-shelf method should not be the default. They wanted to retain a reference period that was consistent with the WTR, a standard mechanism that would cater for mobile workers in the rail sector as well. On the other hand, the FTA queried whether a choice of methods for calculating working time would add value, or merely create confusion.

Peninsula Business Services asked whether employers should enter 48 hours per week and 8 hours per day for part time workers on leave. UKPIA Petroleum, the Federation of Petroleum suppliers asked if they could enter 40 hours a week for holidays, as this was more representative of the amount of work they did each week. Asda also thought 40 hours was more a more representative figure and that instead of 8 hours, a day's leave should be 48 hours divided by the normal 4 or 5 day working week. They were also concerned that temporary staff, who typically work 4-6 weeks during peak periods, were likely to breach the 48 hour limits because of the short reference period.

The Government's Response

In the light of consultation, the Government believes it would be appropriate to amend the regulations to allow the option of using the method of calculating working time provided for under the 1998 regulations.

Whichever method is used, statutory annual leave and sick leave must be neutral when calculating average working time. Our draft regulations used a

new method of compensating for statutory leave - employers must add a notional 48 hours working time for each week of leave and a notional 8 hours for every day of leave that is taken by the worker. We chose 48 hours because this by definition would be neutral in the calculation of the average 48 hour week. Similarly, six days of 8 hours equals a 48 hour week.

(iv) Views sought on our new proposals for excluding "occasional mobile workers" (ie those driving only occasionally in the reference period and spending most of their time doing non-mobile work) from the scope of the new regulations. (Occasional workers would need to comply with limits under the Working Time Regulations 1998 (as amended) and with EU drivers' hours rules).

Main points:

- Employers wanted further flexibility, arguing that only those driving on average more than once a week should be brought within the scope of the RTR.
- Unions were concerned about the idea of occasional workers, believing this would provide another loophole and would lead to more use of temporary / agency workers.
- More guidance was sought about the trigger for switching from the WTR and the RTR

In Detail:

Whilst welcoming the Government's proposals for dealing with occasional mobile workers, views from the Road Haulage Association and the Freight Transport Association were typical of most employers in arguing that the threshold was too low to be really useful. The FTA would prefer an annual limit of 40 days a year, the CBI was also concerned that our proposals did not address occasional drivers who were under a 52 week reference period. The RHA and R Brett & Sons thought vehicle fitters would still be caught by the RTR - they drive vehicles frequently but only for short periods of time.

The TUC and RMT argued that excluding occasional drivers would encourage employers to use agency / temporary drivers. The T&GWU and Communication Workers questioned whether the Directive allowed this distinction. The T&GWU argued that the definition introduced a serious loophole which could only be dealt with by applying the RTR to everyone who drove under EU driver's hours rules, no matter how infrequently. The GMB took a different tack. As a minimum, they should be subject to 60 hour limit under the RTR and EU drivers' hours rules for the week in question. But ideally, working time would be reduced to 48 hours for each week of driving.

The Government's response

The Government believes that its proposals represent the best approach in the circumstances, and strikes a reasonable balance. The Government will make no change to the Regulations. However, we will provide further clarification in the guidance. The government will keep the application of these provisions under close review.

(v) Views sought on excluding non-road transport activities from the definition of working time

Main points:

- Clarification sought about which activities fall outside the road transport sector for the mobile worker.
- Some employers wanted 'other work' (e.g. working in a warehouse) removed from the definition of working time
- The Unions (and even some employers) were concerned that our advice could be confusing and would encourage mobile workers to apply for 2nd jobs outside road transport.

In Detail:

The **Cold Storage Distribution Federation (CSDF)** wanted more details of work that did not count as working time under the RTR. It was also discriminatory that non-road transport work for the main employer, counted towards the limits under the RTR, but work done for a second employer did not.

TSSA argued that all work related activities must count as working time and that our guidance would be confusing, generate disputes and increase fatigue. The RHA would also prefer all work (except voluntary work) to count towards the limits under the RTR. **Key 3 consultants** and some employers thought our proposals were a loophole that would encourage workers to get 2nd jobs outside the road transport sector. **National Express** wanted "road transport activities" to be defined. They asked if doing clerical work for a taxi firm was classed as a road transport activity **Tachograph Analysis Consultants** asked whether it was legal for a driver to work 13 x 60 hours in road transport, then work 4 x 40 hours on a building site.

The Government's Response

The definition of working time under the new regulations is copied from the road transport directive. This definition includes driving, loading and unloading and other work that is clearly linked to the activities and functions of drivers in the road transport sector. But it does not include work performed outside the road transport sector.

The Government wishes to strike a balance between providing adequate protection for employees while avoiding requirements that are not laid down in the Directive. Examples in the guidance of non-road transport activities excluded from the definition of working time will be limited to work as a retained fire-fighter, a special constable or a member of the reserve forces.

Other issues:

(vi) Referring to non-statutory leave when calculating average working time

Most employers welcomed our guidance that non-statutory annual leave could be used to reduce average working time. The FTA, RHA and others thought that some of the detail was incorrect, because existing employment law gave employers considerable discretion about what leave can be taken (and when), than was represented in our guidance.

The CSDF and Dairy UK wanted to be able to use statutory leave to bring down the average working time.

The trade unions want all annual leave (contractual as well as statutory) to be neutral when calculating working time. Otherwise it could be used to undermine existing collective bargaining arrangements.

The Government's Response

The Government has reviewed this issue carefully and concluded that no change needs to be made to the Guidance.

(vii) Whether training should be counted as working time

The FTA argues that the Road Transport Directive links working time to 'normal' work and that as training does not include participating in the day to day commercial activities of the business, it should not count as working time. In particular, classroom training is not normal work and should not therefore be counted as working time. Under recital 12, the directive stipulates that night workers should not be disadvantaged with regard to training opportunities. The CBI, RHA and other trade associations concur that all or certain types of training should not count towards the limits under working time.

The Government's response

The Government has reviewed this issue carefully and concluded that no substantial change needs to be made to the Guidance.

(viii) Emergencies

The FTA, CBI and CIA argued that the advice on dealing with emergencies in the guidance should be broadened and be incorporated in the regulations. Drivers and crew also need to respond to situations where buildings collapse, or where there is serious disruption to the main public services (as outlined in the UK domestic drivers' hours rules). The FTA also wanted to apply the emergency provisions under the WTR to drivers and crew under the RTR. Several respondents noted that there was no provision to waive the working time limits for a national emergency (e.g. Foot and mouth; terrorist attack).

The Government's Response

The Government believes the advice in the draft guidance on this point does not need to be changed.

Although the Road Transport Directive (Directive 2002/15/EC) contains no emergency provisions, there are provisions under the Drivers Hours Regulation 3820/85. Article 13(2) enables member states in urgent cases, to grant a temporary exception for a period not exceeding 30 days, which must be notified to the Commission. Longer exceptions may be granted, if authorised by the Commission. The same exemption will be used to adjust working time limits under the RTR.

(ix) Periods of availability (crew):

The British Association of Removers (BAR) argued that time spent travelling to a location by porters should count as a period of availability rather than working time.

The Government's Response

The Government believes no further changes are needed to the Regulations at this stage, but minor adjustments have been made to the guidance to clarify this point.

(x) Adequate Rest for crew:

The FTA was concerned that the regulations applied EU drivers hours rest limits on crew and other travelling staff. They argued they should be covered by "adequate rest" requirements under existing WT regulations 98 (as amended). The British Association of Removers confirm that subjecting porters to the same weekly and daily rest requirements as drivers, will cause logistical problems for many removers - especially those involved in week-end office moves.

The Government's Response

The Government maintains its view that drivers and crew should be covered by rest provisions under EU driver's hours rules. If this issue is not tackled under these Regulations it would have to be addressed under the main Working Time Regulations, probably with a similar conclusion.

(x) Workforce Agreements

RHA would like procedure behind workforce agreements to be simplified and applicable to individuals rather than groups of workers.

The Government's Response

The Government has considered this request but wishes to retain the arrangements already set out.

(xi) Agencies -

More information was sought about how workforce agreements apply to agency drivers.

Recommendation

The guidance has been reviewed but the Government has not identified any obvious gaps. However, the guidance will be kept under review.